

July 21, 2005

Anne Mayer, Division Head  
Programming and Administration  
Riverside County Transportation Commission  
Riverside County Regional Complex  
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P. O. Box 12008  
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**Re: Your Request for Informal Assistance  
Our File No. I-05-115**

Dear Ms. Mayer:

This letter is in response to your request for advice regarding post-governmental employment provisions of the Political Reform Act (the "Act").<sup>1</sup> Because your letter seeks general assistance we are treating your request as one for informal assistance.<sup>2</sup> This letter should not be construed as assistance on any conduct that may have already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code section 83114.)

### **QUESTIONS**

Do the Act's post-governmental employment restrictions prohibit you from engaging in any of the following activities:

1. Attendance and participation at meeting and workshops sponsored by or including the California Department of Transportation where the topics of discussion are transportation policy related and not tied to specific permits or contracts?

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> Pursuant to regulation 18329, subdivision (c)(3)(copy enclosed), informal assistance does not confer immunity.

2. Public comment on behalf of Riverside County Transportation Commission projects at California Transportation Commission meetings?
3. Meetings with California Department of Transportation employees to obtain information on policy and procedure and to discuss implementation as it relates to RCTC funded projects and programs?
4. Meetings with California Department of Transportation employees regarding issues related to Riverside County Transportation Commission funded freeway projects governed by Public Contracts code (i.e. low bid contract)? Meeting topics could include contractor performance, traffic control issues, Federal Highway Administration coordination, and funding?
5. Coordinating implementation of AB 850 franchise agreements in cooperation with the California Department of Transportation?<sup>3</sup>

### **CONCLUSIONS**

1. & 3.— 5. As a former “designated employee” of the California Department of Transportation (“Caltrans”), the Act’s post-governmental employment restrictions apply to you, and you are prohibited for one-year after leaving state service from making any formal or informal appearance or any oral or written communication before Caltrans, if it is for the purpose of influencing administrative or legislative action. You may attend informational meetings or seminars for the purpose of obtaining information regarding procedures and implementation of programs so long as you do not attempt to influence any changes in those procedures or programs.

2. The Act’s one-year ban applies only to your former employer and those agencies under its direction and control. Because the California Transportation Commission (“CTC”) is not under the control of Caltrans, the one-year ban does not apply to your attendance at CTC meetings, provided the appearance is not intended to influence Caltrans officers or employees.

### **FACTS**

You were formerly employed by Caltrans as a district director for San Bernardino and Riverside Counties. As a district director, you were responsible for all Caltrans issues; including management, operation, and maintenance of the state highway system in those two counties. Your position was designated in the agency’s conflict of interest code. You resigned your position on April 30, 2005. You are currently employed as a division head for programming and administration for the Riverside County Transportation Commission (“RCTC”). Your duties included management of RCTC

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<sup>3</sup> AB 850 (toll roads) would authorize the California Department of Transportation to enter into comprehensive development franchise agreements with public and private entities for specific types of transportation projects and would authorize tolls to be collected after the termination of a franchise agreement period. (AB 850, Legislative Counsel’s Digest).

programming, which included transportation project funding. Funding sources are federal, state, and local. You serve as the chief operations officer for the agency and you report directly to the Executive Director, who is the agency head. RCTC is a commission created pursuant to the provisions of the Public Utilities Code section 130050, et seq.

You wish clarification on whether the following actions are limited by the Act's restrictions on post-governmental employment activity, also known as the revolving door restrictions:

1. Attendance and participation at meeting and workshops sponsored by or including Caltrans. Topics of discussion are transportation policy related and not tied to specific permits or contracts. Examples of topics for discussion or information sharing include: federal transportation law (TEALU, SAFETEA), state budget updates, state transportation law (i.e., SB 705, AB 1266, AB 1020 and AB 850) and state transportation policy/procedures. Attendees include representatives of Caltrans, Business, Transportation and Housing Agency ("BTH"), county transportation commissions, consultants, local agencies, transportation lobbyists and the public.
2. Public comment on behalf of RCTC projects at California Transportation Commission ("CTC") meetings. The CTC is responsible for transportation funding policy and allocation. As governed by SB 45, RCTC state transportation improvement program funding decisions are approved by the CTC. The CTC coordinates with Caltrans, BTH Agency and the Governor's office on transportation policy.
3. Meet with Caltrans employees to obtain information on policy and procedure and discuss implementation as it relates to RCTC funded (partially or fully) projects and programs. Example 1: Caltrans, in partnership with RCTC, could utilize design/build strategies authorized by SB 705 on freeway projects within Riverside County.
4. Meet with Caltrans employees regarding issues related to RCTC funded freeway projects governed by Public Contracts Code (i.e., low bid contract). Example RCTC has partially funded a freeway construction project within Caltrans right-of-way. Caltrans as "owner" of right-of-way has oversight role in project issues. Meeting topics could include contractor performance, traffic control issues, Federal Highway Administration coordination and funding.
5. Coordinate implementation of AB 850 franchise agreements in cooperation with Caltrans cited in AB 850 section 1, amended May 3, 2005.

## ANALYSIS

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the “revolving door” prohibition and the permanent ban on “switching sides.” The first restriction is the “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state (see sections 87401-87402, regulation 18741.1). The second restriction is the “one-year ban” prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action (see section 87406, regulation 18746.1).

### **I. The Permanent Ban on “Switching Sides”**

The first post-employment restriction under the Act is a permanent prohibition on influencing any judicial, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402; regulation 18741.1.) In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400, subdivision (c) defines “judicial, quasi-judicial, or other proceeding as:

(c) “Judicial, quasi-judicial or other proceeding” means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to, any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

An official is considered to have “participated” in a proceeding if the official took part “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee....” (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); regulation 18741.1(a)(4).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.)

You have not provided any information as to your participation in any proceeding while employed as a state administrative official at Caltrans that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you now wish to engage on behalf of your new employer involve a proceeding in which you participated while employed at Caltrans, or were deemed to have participated as a supervisor. (Regulation 18741.1(a)(4).)

## **II. The One-Year Ban — “Revolving Door”**

### **A. Application of the One-Year Ban.**

Section 87406 of the Act prohibits specified officials from acting as an agent or attorney or otherwise representing, for compensation, “any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof,” for one-year after the official left the agency’s employment “if the appearance or communication is made for

the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” An appearance before a state administrative agency does not include an appearance in a court of law or before an administrative law judge. (Section 87406(d), see also regulation 18746.1.)

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, *attending a meeting*, and delivering or sending any communication.” (emphasis added).

As a district director for San Bernardino and Riverside Counties for Caltrans, you were a “designated employee” under the Act, i.e., a decision-making employee whose position is designated in a state agency’s conflict of interest code, and who is required to file an annual statement of economic interests. As a designated employee of Caltrans who has left state service, the Act’s one-year ban applies to you. (Section 87406(d)(1); regulation 18746.1(a)(2).)

Regulation 18746.1(b) provides guidance about when the prohibitions of the one-year ban will apply. Under that regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

“(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.

(2) The appearance or communication is made within 12 months after leaving state office or employment.

(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to

represent his or her personal interests, as defined in 2 Cal. Code Regs. Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Government Code Sections 87401 and 87402 [the permanent ban on “switching sides”] may apply.

(6) The appearance or communication is made before any officer or employee of any of the following:

(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment...

(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A)...

(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the 12 months before leaving state office or employment.”

#### B. Agencies Covered by the One-Year Ban.

A designated employee's state administrative agency means the agency for which he or she worked or represented, or any board or commission under the agency's control. (*Gould Advice Letter*, No. A-96-077.) The agency you worked for was Caltrans. CTC is not an agency under the direction and control of Caltrans.<sup>4</sup>

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<sup>4</sup> The CTC is a nine-member commission (plus two ex-officio members) appointed by the Governor. The commission is responsible for the programming and allocation of funds for the construction of highway, passenger rail, and transit improvements throughout California. As such, Caltrans receives

As a result, you may not for one year, for compensation, act as a representative or agent for any person before Caltrans “for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406.) You may, however, appear before CTC and California departments other than Caltrans, provided there is no prohibited conduct before an officer or employee of Caltrans involved in that appearance.

### C. Communications Covered by the One-Year Ban.

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) A communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2(a).)

However, certain communications are not restricted under the one-year ban. It is not considered a prohibited communication under the one-year ban, if an individual:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- (2) Attends a general informational meeting, seminar, or similar event;
- (3) Requests information concerning any matter of public record; or
- (4) Communicates with the press.” (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban does not prevent you from requesting information generally available to the public about agency business from Caltrans or other state agencies. Nor does it prohibit you from attending informational meetings of Caltrans or another state agency regarding existing laws, regulations, or policies, as long as you do not attempt to influence the agency's legislative or administrative action. Social conversations with employees of Caltrans and other state agencies, not intended to

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funds from the commission in connection with highway construction and the department is, at least to some degree, under the budgetary control of the commission. (See *Duffel* Advice Letter, No. I-90-390.)

influence administrative or legislative action, are not prohibited by the ban. (*Tobias* Advice Letter, No. A-96-089.) (Section 87406(d)(1).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee's attendance is not for the purpose of influencing the agency's action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (section 87406(d)), it may more readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, A-99-300.)

Therefore, in response to your questions concerning your attendance and participation at meetings with Caltrans employees, you are permitted to attend and participate to the extent that your actions are not for the purpose of influencing administrative or legislative actions or any other actions or proceedings enumerated in section 87406(d) involving Caltrans. You may attend and participate in any matters that are for the purpose of obtaining information on policy and procedures and the implementation of existing programs as long as you do not attempt to influence any changes in such programs.<sup>5</sup>

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: William J. Lenkeit  
Counsel, Legal Division

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<sup>5</sup> Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.